

86-019

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Ohio Civil Service Employees Association/
American Federation of State, County & Municipal Employees,
Local 11, AFL-CIO,

Employee Organization,

and

Hamilton County Welfare Department,

Employer.

CASE NUMBER: 84-RC-04-0080

DIRECTION OF RE-RUN ELECTION
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix; May 8, 1986.

On July 11, 1984, a representation election was conducted by SERB for an appropriate unit of employees of the Hamilton County Welfare Department, now known as the Hamilton County Department of Human Services (Employer). After a hearing to resolve challenged ballots, the Board determined that the final vote was 355 for "No Representative" and 354 for Ohio Civil Service Employees Association, Local 11 (Employee Organization). The Board remanded the case to hearing for resolution of election objections that had been raised by the Employee Organization.

The Board has reviewed the Hearing Officer's report, the record, exceptions, and responses to the exceptions. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations 1 and 2. The Board modifies Recommendation 3 as it relates to the solicitation/distribution policy and directs the parties to adhere to the policies set forth in the Opinion. The Board sets aside the results of the July 11, 1984, election and, pursuant to Ohio Administrative Code Rule 4117-5-10(B), directs that a re-run election be conducted on the date and times and at places to be determined by the Board's representation staff in consultation with the parties.

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Only those employees eligible to vote in the previous election will be eligible to vote in the re-run election. No later than May 26, 1986, the Employer shall file with the Board and serve upon the Employee Organization a copy of the eligibility list stating the names and home addresses of all employees who were eligible to vote in the first election, including those employees for whom eligibility was determined or settled as a result of the March 1985 resolution of challenged ballots.

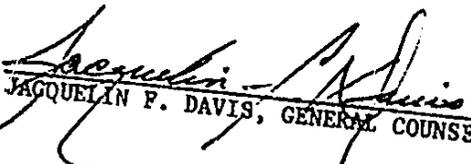
It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.



JACK GRANT DAY, Chairman

I certify that this document was filed and a copy served upon each party on this 12th day of May, 1986.



JACQUELIN F. DAVIS, GENERAL COUNSEL

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OPINION

Day, Chairman:

This representation case raises five crucial questions. The questions will be determined in the order of listing. They are:

1. Is a bargaining order an appropriate remedy in this case?
2. Is it permissible to consider conduct prior to April 1, 1984, in determining the objections to the election in this case?
3. Did the Employer violate the statutory guarantee of a free and untrammelled election by conducting captive audience speeches among its employees?
4. Did the Employer's promulgation and enforcement of its solicitation /distribution policy interfere with a fair election?
5. What is the appropriate remedy, if any?

For reasons adduced in connection with the respective dispositions of the issues a re-run election will be ordered.

I

1. Is a bargaining order an appropriate remedy in this case?

At bottom, this issue raises the question whether certification under R.C. 4117.07(A)(2) should be imposed.¹ The relevant language from that statutory sub-section is:

"The Board may also certify an employee organization as an exclusive representative if it determines that a free and untrammelled election cannot be conducted because of the employer's unfair labor practices and that at one time the employee organization had the support of the majority of the employees in the unit."

It is apparent that the basis for certification under the quoted language requires proof of three elements. The employer must have committed unfair labor practices. The union must demonstrate majority support before the unfair practices. And (implicitly) it must be proven that the employer's unfair practices caused the majority to dissipate.

The initial election resulted in a "no representative" majority by one vote.² In the record before the hearing officer, there was no proof that an actual union majority ever existed. Neither was there evidence demonstrating that unfair practices caused a watering of a union majority to minority status. To conclude a remedial certification is warranted under these circumstances, would require an inference on an inference. The initial inference would be that a majority once existed solely because of

¹Two other methods of certification are available under the statute (1) after a successful representation election (R.C. 4117.05(A)(1) or (2) voluntary recognition (R.C. 4117.05(A)(2)). Neither is involved under the issues in the present case.

²The vote was 355 to 354 in favor of no representative, OCSEA, Local 11 and the Hamilton County Welfare Dept., (1985) 2 OPER Par. 2343. In tie votes between employee organizations and no representative, the latter prevails because an employee organization needs a majority of the "valid ballots cast." [R.C. 4117.07(C)(3)]

the close vote in the representation election. This inference would then have to be coupled to a second. The second inference would have to be that illicit employer activity so infected the balloting that the inferred majority was reduced ineluctably to a minority and, under the circumstances, that an "untrammelled" choice is now impossible in a second election. Thus, the evidence will not support the necessary elements of proof for remedial certification without an inference on an inference. The frailties of proof in this stance are evident.³

Remedial certification and bargaining will not be ordered.

II

2. Is it permissible to consider conduct prior to April 1, 1984, in determining the objections to the election in this case?

It is quite clear that conduct which preceded April 1, 1984 (the effective date of R.C. 4117) cannot be the basis for an unfair labor practice charge, NOPBA and Cuyahoga County, (1984) 84-ULP-4-0032, 1 OPER Par. 1056. However, it would be ingenuous to assume that interfering, restraining or coercing conduct ceases to have effects simply because a particular date arrives. Peripeteia may do as a theatrical device. In real life reversals of conditions are not that cleanly cut. Neither fairness nor jurisdictional responsibility requires the Board to be artless. Effects have a carry beyond the moment they cease to be legal. Accordingly, the post-April 1, 1984 effects of pre-April 1, 1984 conduct may be considered in gauging whether the electoral environment has been so tainted that a

³McDougall v. The Glenn Cartage Co. (1959) 169 Ohio St. 522, 9 00 2nd 12, 14. The proof necessary for setting aside results and ordering a re-run is not as extensive as that for remedial certification. See III and IV, infra.

representation re-run election cannot be conducted under the "free and untrammelled" conditions mandated by the statute.⁴

III

3. Did the Employer violate the statutory guarantee of a free and untrammelled election by conducting captive audience speeches among its employees?

Some of the captive audience speeches by the present employer took place before April 1, 1984 and some after. It is difficult to impossible to derive a finite mensuration of the effects of captive audience speech. But, because it is important to preserve the appearance as well as the fact of free representation elections, the Board has adopted the view that any captive audience activity will be deemed to fatally flaw the free and untrammelled conditions required for a licit election.⁵

In this case it is unnecessary to determine whether the pre-April 1, 1984 captive audience is sufficient for the per se application of SERB's

⁴R.C. 4117.07(A)(2). On the thrust and carry of prior legal conduct and its subsequent illegal effects, see Bethlehem Shipbuilding Corp. v. NLRB (1 Cir. 1940) 114 F. 2nd 930,938:

"What Bethlehem did before July 5, 1935, is, of course, no violation of the Act. But since that date there has been no break in the continuity of the Plan, and the Board might conclude, not unreasonably, that the effect of Bethlehem's prior conduct in canalizing the employees' desire for representation carried over after the Act was passed and constituted a continuing obstacle to the exercise by employees of their free choice of bargaining representatives...." Cf. also NLRB v. Dakin (9 Cir. 1973) 82 LRRM 3090, 3091.

⁵See Ohio Council 8, AFSCME and Noble County Engineer, (1985) 2 OPER Par. 2632; Ohio Council 8, AFSCME and Belmont County Engineer (1985) 2 OPER Par. 2652. There are conceivable constitutional arguments against public sector captive audiences which do not apply to private employers. At least it is arguable that a public sector employer's compelled audience meets the state action element requisite to a claim of violation of the 14th Amendment.

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captive audience doctrine or merely poses a possible taint. Here the captive audience included violations after April 1, 1984. The per se rule requires a re-run.

4. Did the Employer's promulgation and enforcement of its solicitation /distribution policy interfere with a fair election?

The Hearing Officer's findings indicate that management began an organized campaign to oppose unionization shortly after the passage of Amended Substitute Senate Bill No. 133⁶ on June 30, 1983.⁷ Orchestrated by its director, Seth Staples, the employer enlisted supervisors in a campaign to oppose unionization.⁸ The orchestration included seminars on the new law conducted by a management consultant firm.⁹ The Hearing Officer found the consultants "gave the impression" they "could assist employers in resisting unionization."¹⁰ Eventually the employer contracted with the consultants to provide "such employee relations and personnel services as might be requested."¹¹ An audit was made to test the employees' concerns. The Hearing Officer found one of the audit purposes to be the creation of an environment in which the employees "would not desire a union."¹² This included suggestions to some employees that

⁶Ohio Public Employee Collective Bargaining Act (R.C. 4117).

⁷Findings of Fact (FF) No. 3.

⁸Id.

⁹FF No. 5.

¹⁰Id.

¹¹FF No. 6.

¹²FF No. 7.

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"things were going to get better," that working conditions would improve "in the area of case load and staff additions."¹³ The consultants recommended a variety of improvements in conditions and identified union high strength areas in a ten page paper submitted to Staples.¹⁴ An action agenda was prepared with assignments and time tables and costs.¹⁵ The Hearing Officer does not explicitly attribute the action agenda to the consultants. However, that seems the fair inference, especially because several of the "key" recommendations "were addressed" in a document entitled "Employee Representation Philosophy" distributed in March 1984. That document dealt with a variety of changes in personnel policy and employee benefits.¹⁶

On the day after the effective date of the Act, Staples announced budget approvals to increase staff, and, curiously, the installation of new liquid soap dispensers in the rest rooms. According to the findings of the Hearing Officer, Staples distributed a memorandum both memorializing these improvements and stating "this is the first of a number of things we are going to do to upgrade the building and make the work environment more pleasant." In a later communique, Staples advised employees of further improvements in building conditions including sanitation.¹⁷

¹³Id.

¹⁴FF No. 8.

¹⁵FF No. 9.

¹⁶FF No. 10.

¹⁷FF No. 11.

The recital of the employer's actions is not intended to be pejorative. Rather it illustrates the importance the employer, and Mr. Staples, attach to communication. And it provides a backdrop against which the balance between the employer's solicitation/distribution policies applicable to the employee organization and the employer's own actions may be measured.

For some years before union representation became a prime concern, solicitation/distribution (S/D) on the employer's premises had been the subject of regulation. From the Findings of Fact¹⁸ it appears that early S/D on premise policy was directed toward commercial efforts by outsiders. Then in 1981, the killing of a worker on the job had resulted in tightening of security.¹⁹ On September 28, 1983, Mr. Staples issued a new bulletin reiterating the commercial policy and adding "no non-employee is to solicit or be permitted to solicit on or in any property operated by the [Employer]."²⁰ In the bulletin further refinements of S/D policy were made. All bulletin board notices had to originate with employees and be signed and dated by them.²¹ The messages were to be non-defamatory and in good taste. Non-complying materials were subject to removal.²² Beginning in March of 1983, Michael Temple, representing the union, was able to get a badge from security and move about the premises on union

¹⁸FF No. 12.

¹⁹FF No. 13.

²⁰FF No. 12.

²¹Id.

²²Id.

business at will²³ until August of 1983 when a house lawyer saw him and another union employee talking to an employee/union officer, Mr. Clarence Redding, in the latter's office. The lawyer asked the union representatives and Redding to leave the work area and go to the cafeteria. This was a change in practice.²⁴

Director Staples' September 28, 1983 memorandum was found by the Hearing Officer to be a response to what Staples perceived as loose practice. This perception apparently came when he, Staples, learned of the freedom with which the union representatives moved about the workplace on union business.²⁵

From September of 1983 through March of 1984, Temple was allowed in the employer's building for 15 minutes before and 15 minutes after grievance hearings. In addition, he had a management escort to the personnel department for the hearings. After March of 1984, the escorting stopped but the time limits continued.²⁶ Union representatives were denied all access to any part of the management premises from October of 1983 until March of 1984 except for grievance representation.²⁷

Prior to September 28, 1983, Mr. Redding passed out dues deduction authorizations and literature to employees who were on break or who came to

²³FF No. 14.

²⁴FF No. 15.

²⁵FF No. 16.

²⁶FF No. 17.

²⁷Id.

his office. After September distributions of both kinds were prohibited on the premises and Redding needed prior management approval before posting anything on the bulletin board.²⁸ In December of 1983, a management document labelled "Additional Clarification of Employee Representation Philosophy" ordained "no distribution of goods or printed matter in the agency at anytime or any place."²⁹

The consultants found the old S/D policy too restrictive and management provided a new one which provided in part:

"Non-Employees

Persons not employed by the Hamilton County Welfare Department and off-duty Welfare Department staff may solicit or distribute for any lawful purpose on public parking lots so long as there is no interference with persons coming to and leaving work. Non-employees are not permitted access to department working and non-working areas for any purpose to ensure continued client confidentiality and the uninterrupted delivery of agency services. Former employees and spouses and children of current employees may be granted access to specified work or non-work areas with prior approval or (sic) Personnel Services.

Employees

Employees of the Hamilton County Welfare Department may solicit for any lawful purpose during non-working time. It is recommended that any solicitation occur in non-work areas to avoid interruptions to staff who remain on working time. Employees are not permitted to solicit, conduct personal business, or distribute printed matter or goods for any purpose during working time of the employee soliciting or the employee being solicited. Employees are not permitted to distribute printed matter for any purpose in work areas.

Working time means all the time when an employee's duties require him or her to be engaged in work tasks, but does not include an

²⁸FF No. 19.

²⁹FF No. 18.

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employee's own time such as meal periods and scheduled breaks. The only exception to this policy is solicitation and distribution for the annual United Appeal campaign which is related to the business functions of the agency."³⁰

In contrast, the employer's labor relations advisors (i.e., the consultants) and the advisor's employees were given "essentially unrestricted" access to the employer's premises. While there as the advisors' representatives, they discussed the employer's campaign (against union representation) with supervisors on the supervisor's working time. Supervisors distributed employer literature to employees during working hours in working areas. Employees were encouraged to ask questions "at your convenience" about the employer's election position. Thus, the S/D policy was not applied to those conducting the employer's campaign against representation.³¹

The lack of even handedness in this double standard S/D policy is manifest.³²

Since a re-run election will be ordered for a specified time and date, presumably both sides will press new election campaigns. S/D access

³⁰FF No. 20.

³¹Id.

³²On what fairness may require see National Labor Relations Board v. Babcock & Wilcox Co. (1965) 351 U.S. 105, 112:

"It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (Emphasis supplied.)

principles to be followed to insure fairness in these new campaigns, if any, are these:³³

For non-employees:

1. The organization or its non-employee agent which intends a S/D visit to the interior premises of the employer's facility shall give the employer not less than 24 hours notice of each visit.
2. The notice shall be accompanied
 - (a) by a list of persons and alternates intending access and
 - (b) a designated time.
3. The employer will designate at least two, but no more than five, non-work areas for employee organization S/D activity.³⁴ All such areas shall be non-work areas. All S/D shall be confined to non-work time in non-work areas.
4. The employee organization and its agents, whether non-employees or employees, shall be permitted access to each bulletin board. Notices shall be no larger than 8-1/2" by 11" and placed so as not to obstruct other notices." A list of the

³³Only one employee organization will be involved in the re-run ordered in this case. For that reason the principles are designed for that condition. Some additions would be required were it necessary to regulate access by more than one employee organization.

³⁴"No representation" activity, uninspired by the employer, is permitted individual employees. An assumption of the employer's permissiveness on this score is warranted by the history of its own activity. No person has raised any question of lack of access for self-motivated individuals with standing who desire to campaign for "no representation."

locations of bulletin boards will be supplied the employee organization by the employer on request.

5. The employee organization or non-employee shall have access to parking lots without advance notice to the employer.
6. Any disagreements over the application of these rules shall be submitted to the Administrator of elections and subject to review by the State Employment Relations Board after the election unless the dispute is mooted at that time.

For employees:

1. An employee may conduct S/D activity in both work and non-work areas, but only if both employees are on non-working time.

General Rules:

The employer may regulate any S/D activity by any employee or non-employee which disrupts or interferes with the normal work on the employer's premises.

Definitions:

1. The definitions in 123:7-1-04 of Appendix A attached to the Hearing Officer's Recommended Determination are adopted and incorporated here by reference as though fully rewritten.

5. What is the appropriate remedy, if any?

The Board adopts the Hearing Officer's first and second recommendations but not necessarily his reasoning. The Board does not adopt the Hearing Officer's third recommendation with respect to Appendix A, but modifies it as indicated in this opinion. The modified third recommendation is adopted as modified.

* * *

A re-run election is ordered and will be held in the same unit in which the initial election was conducted. The terms shall be the same as in the first balloting except for modifications, if any, in this opinion. The time and date of the re-run will be determined by the administrator of elections in consultation with the parties.

Sheehan, Vice Chairman, and Fix, Board Member, concur.

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